Supreme Court, U.S.
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No. 90-1705

IN THE

Supreme Court of the United States

October Term, 1990

ELI MIRZOEFF,

Petitioner,

against

MOTI NAMDAR,

Respondent.

ON PETITION FOR CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

PETITION FOR CERTIORARI

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NYC 212-732-6978 Westchester 914-681-1322 Long Island 516-222-0221
(6256—LC3-419)

Question Presented

Does New York Civil Practice Law and Rules, §7511, as applied herein to permit an arbitrator, selected under a trade association's compulsory arbitration rules, to engage in business dealings with a party during the pendency of the arbitration, unconstitutionally violate the guarantee against deprivation of property without due process of law contained in the Fourteenth Amendment to the Constitution of the United States?

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990.

ELI MIRZOEFF,

Petitioner,

against

MOTI NAMDAR,

Respondent.

ON PETITION FOR CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

PETITION FOR CERTIORARI

Petitioner respectfully prays a writ of certiorari issue to review the judgment of the Appellate Division of the Supreme Court, First Department, entered on May 10, 1990.

Opinions Below

The Court of Appeals of the State of New York denied leave to appeal and rehearing of petitioner's motion for leave to appeal and for amendment of its remittitur without opinion. To date, these orders have been noted only in the New York Law Journal of March 29, 1991, p. 25 col. 5 and February 11, 1991, p. 21 col. 5, *sub nom. In re Namdar (Mirzoeff)*. They are reproduced at pages 1a and 3a of the Appendix hereto. The order of the Appellate Division of the Supreme Court, First Department, entered October 2, 1990 denying leave to appeal to the Court of Appeals, is not yet reported. It appears at page 4a of the Appendix.

The decision of the Appellate Division is published at 161 AD2d 348, ____ N.Y.S.2d ____. It is reproduced along with its order of affirmance at pages 6-9a of the Appendix.

The decision of the Supreme Court, New York County (Hon. Karla Moskowitz) is unpublished and appears at page 10a of the Appendix. The judgment of that Court entered January 20, 1989 appears at page 14a of the Appendix.

Jurisdiction

The Appellate Division's order of affirmance was entered on May 10, 1990. That Court denied leave to appeal to the Court of Appeals on October 2, 1990. The Court of Appeals of the State of New York denied leave to appeal on February 7, 1991 and denied rehearing in an order dated March 27, 1991.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV, §1, provides in pertinent part:

> "* * * nor shall any State deprive any person of * * * property, without due process of law [.]"

New York Civil Practice Law and Rules, §7511 (McKinney's, 1980, p. 576), provides, in pertinent part,

> §7511 Vacating or modifying award
>
> * * *
>
> (b) Grounds for vacating.
>
> 1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by
>
> (i) corruption, fraud or misconduct in procuring the award.
>
> (ii) partially of an arbitrator appointed as a neutral[.]
>
> * * *

Statement of the Case

Petitioner and respondent are members of the Diamond Dealers Club, Inc. ("DDC") or ("Club"). It is the world's leading diamond bourse. Situated on Manhattan's Fifth Avenue, corner of West 47th Street, in the heart of the

diamond district, where 99 percent of the wholesale diamond dealers in the United States are located, it is the venue for much of the world's wholesale trade in cut and uncut diamonds as well as other precious gems, *Lipschutz v. Gordon Jewelry Corporation,* 373 F. Supp. 375, 379 (S.D. Tex. 1974). Serving as trade association, marketplace, offices, restaurant and more, the Club's preeminent position in the industry is acknowledged, *id.,* F.n. 3.

The by-laws of the DDC require that business disputes between members, such as petitioner and respondent, be adjudicated before its arbitration tribunals.

Arbitrators are chosen from a thirty-two member panel elected by the Club's membership, which totals approximately 2,000. Hearings are held before a panel of three arbitrators. A hearing *de novo* is authorized before a five-member appeals committee to review a decision of a three-arbitrator panel.

Final awards are subject to enforcement and judicial review pursuant to New York Civil Practice Law and Rules, Article 75, as well as the United States Arbitration Act (9 U.S.C. §1, *et seq.*), as appropriate.

The dispute giving rise to this litigation arose when petitioner received a 53.98 carat sapphire, valued at $75,000 "on memorandum" from the respondent's brother-in-law to show it to a prospective buyer. Petitioner insists that he personally returned the gem to respondent's brother-in-law, who shares office space with respondent. The brother-in-law did not have the memorandum in his possession at the time petitioner returned the sapphire. However, according to petitioner, he promised to destroy it. Subsequently, respondent, at petitioner's request, delivered the stone to petitioner's brother in Geneva, who wished to show it to a prospective buyer. Petitioner's brother contended he

received the stone from respondent; signed a memorandum; showed the stone to his customer, who rejected it; he then returned the stone to respondent and received the original memorandum. Respondent contended he issued a new memorandum at petitioner's brother's request so that he could show the memorandum price to his prospect. Respondent further contended he did not give the stone to the petitioner's brother nor was it returned in Geneva.

As required by the DDC's by-laws, the parties submitted their dispute to the Club's arbitration tribunals. The original three-member panel unanimously sustained petitioner and dismissed the complaint (18a). However, as a result of respondent's *de novo* appeal, the five-member appeal panel ruled in favor of the respondent (17a).

The respondent moved in New York State Supreme Court to confirm the arbitration; petitioner cross-moved to vacate the award. Such applications are "special proceedings," *Rhodes Management Co. v. Sweeney,* 81 AD 2d 547-548, 438 N.Y.S 2d 315, 316 (1st Dept. 1981). Where the papers present issues of fact, an evidentiary hearing is required, N.Y.C.P.L.R. 409(b), 410.

Among the grounds urged by the petitioner was the misconduct or partiality of the chairman of the appeal panel, N.Y.C.P.L.R. 7511(b) (1) (i) (ii), due to his business negotiations with petitioner during the pendency of the arbitration "which denied him even a semblance of due process" (10-11a).

It is undisputed, during the pendency of the arbitration proceedings the chairman of the appeal panel negotiated with petitioner the sale of a diamond ring that the chairman saw petitioner wearing. Petitioner stated in his affidavit that the chairman initiated the negotiations. The two had met in the hallway at the DDC headquarters; petitioner's office is located across the hall from the Club's executive offices.

After a brief discussion, the chairman and the petitioner went to petitioner's office where the chairman examined the ring "more closely." The chairman offered to purchase the ring at a price that petitioner "refused as too low." Thereafter, petitioner was told

> "* * * that I should accept his earlier offer or 'I knew what would happen in the next few days'—meaning, of course, that should I not accept his offer, I would suffer at my pending arbitration." (19a).

The chairman conceded that discussions occurred on several occasions: after the designation of arbitrators but before the first hearing (21a), between the two hearing dates and even after the arbitrators' decision had been rendered. Although attempting to characterize the conversations as academic discussions between colleagues over the value of a stone, his description of the post-award discussions, including his desire to weigh the gem on the DDC's official scale (22a), demonstrate that the chairman viewed this course of dealing as a serious business negotiation. He attempted to slough off the negotiations as insignificant, stating that DDC arbitrators

> "are all active, and usually leading members of the diamond dealers community, members of the panel often have conducted business with other members of the club who may be claimants and respondents. Even the arbitrators themselves, as active diamond dealers are often claimants and respondents before the Diamond Dealer Arbitration Tribunals." (20-21a).

While attempting to vindicate his conduct by referring to his long experience as an arbitrator (20a), the chairman chose to omit the specific training given to DDC arbitrators

at the time he joined the panel in January 1981. As explained by the DDC's former general counsel, petitioner's attorney herein,*

> "On a number of occasions from 1980 to about 1983, when the newly elected arbitrators were installed, I would deliver a talk to all 32 arbitrators, counselling them on how to conduct themselves as arbitrators, and on certain situations to avoid. Invariably, I cautioned them not to do business with and to remain aloof from any DDC members who were presently in an arbitration case before them as an arbitrator. I asked them what kind of justice did they think one would get from a Judge who had their case, if they were to see him eating with their adversary's lawyer in a public restaurant during the trial period.
>
> At that time, I pointed out that, while they might be losing business, they should remember that they had assumed a responsibility of great honor and service to the diamond community. I further explained that, when Judges preside in a case (even though they may know the lawyers), they go out of their way not to communicate with the lawyers or be seen with them during the period of time the case is before the Judge. *I emphasized this high standard must be followed* [.]" (emphasis in original) (24-25a).

The chairman never denied receiving these instructions, nor did respondent deny that such instructions were given.

Petitioner thus urged that the chairman's behavior was misconduct and resulted in a fundamentally unfair arbitra-

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*Mr. Bravin represented petitioner at the arbitration and on the internal appeal, but not at the initial court proceedings to confirm or vacate the award.

tion "which denied him even a semblance of due process" (11a).

For purposes of its decision, the trial court accepted the truth of petitioner's contention that the said chairman of the arbitrators was guilty of bias, but held this defect was waived by petitioner's continued participation in the arbitration hearing (11a). On appeal, petitioner urged that he was "entitled to an impartial decision-maker on the appeal arbitration panel, as required by the Due Process Clause." Counsel cited this Court's decision in *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813 (1986) (Appellant's Brief, pp. 21-22). However, the Appellate Division adopted the trial court's waiver theory and affirmed (7a). It should be emphasized that the references in both lower-court decisions to alleged failure of proof of petitioner's claims (6-7, 12a) refer to issues that are not presented herein. However, even if one were to construe those references as applicable to the chairman's business dealings with petitioner during the arbitration, such "fact finding" is patently erroneous and not binding upon this court. The conflicting affidavits should have prompted the state courts to grant an evidentiary hearing as specifically requested by petitioner at Point VI of his Appellate Division brief. The failure to do so was erroneous both by state standards, N.Y.C.P.L.R. 409(b), 410, as well as analogous federal law, Federal Rules of Civil Procedure, Rule 56(c), *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1988). This court is not bound by such purported fact finding where it affects the petitioner's federal constitutional rights. This court will scrutinize the record to determine if governing rules of federal law have been properly applied or where a conclusion of law as to a federal constitutional right and findings of fact are so intermingled as to require such analysis, *N.Y. Times v. Sullivan,* 376 U.S. 254, 285-86 (1964); *Jacobellis v. Ohio,* 378 U.S. 184, 188-89 (1964); *Fiske v. Kansas,* 274 U.S. 380, 385-386 (1927).

Petitioner's claim of denial of due process under the Fourteenth Amendment, because of the bias and misconduct of the abitration chairman, was presented to the New York Court of Appeals in petitioner's motion for leave to appeal, as well as in his motion for rehearing and to amend the remittitur.

Reasons for Granting the Writ

In holding that an arbitration is not tainted by an ongoing business transaction between an arbitrator and one of the parties, the courts of the State of New York have decided an important question under the Due Process Clause of the Fourteenth Amendment. While not yet explicitly decided by this Court, it is a question that, we submit, has been decided below contrary to this Court's analogous decisions and contrary to the decisions of other state courts of last resort.

In the leading case of *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145 (1968), this Court interpreted 9 U.S.C. §10(b) to require a vacatur of an award where an arbitrator maintained an ongoing, undisclosed business relationship with a party. This Court stressed that it was not necessary to show a subjective bias on the part of the arbitrator. It was sufficient to show the relationship between the arbitrator and any of the parties, 393 U.S. at 147. Since the Court in *Commonwealth Coatings* was interpreting a federal statute, it had no occasion to rule on constitutional grounds. However, it compared the arbitrator's situation to that of the state judge in *Tumey v. Ohio,* 273 U.S. 510 (1927). There it was held unconstitutional, regardless of a judge's subjective intent, to make his compensation in any way dependent upon the volume of court fees collected from convicted defendants, *id.* at 148. Thus, the Court clearly signalled that had the arbitration proceed-

ing been conducted under a state arbitration law, it would have been announcing that the Due Process Clause of the Fourteenth Amendment precluded the enforcement of an arbitration award where an *ongoing, undisclosed business relationship existed between an arbitrator and a party.*

What is especially significant herein, as stated by the three *Commonwealth* dissenters, was that this Court had announced a *per se* rule, requiring a vacatur of the arbitration award, by reason of a single arbitrator's nondisclosure of his prior business dealings, even though the panel's decision was unanimous, 393 U.S. at 154. It is also significant that the particular business community involved was small; that the arbitrator had dealt with many of its members and that the aggrieved party's attorney was aware of the arbitrator's background, *id.* at 153.

In its more recent decision in *United Paperworkers International Union v. Misco,* 484 U.S. 29, 38 (1987), this Court observed, *in dictum,* "decisions procured by the parties through fraud or through the arbitrator's dishonesty need not be enforced." Thus, the Court recognized the compelling public interest in maintaining confidence in the integrity of the arbitration process. Although Justices White and Marshall, concurring in *Commonwealth Coatings,* noted that the Court had not decided that arbitrators were to be held to "standards of judicial decorum", 393 U.S. at 150, they stressed, neither would the judiciary "overlook outright chicanery in giving effect to [arbitrators] awards," *ibid.* The Court recognized that maintenance of public confidence in both arbitration and the judicial process is a concern of constitutional dimension, *Commonwealth Coatings, supra; Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813, 825 (1986); *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 864-865 (1988).

Once a party invokes the power of the state courts to enforce an arbitration award, the underlying transactions must pass constitutional muster; otherwise they may not receive judicial sanction, *Shelley v. Kraemer,* 334 U.S. 1, 13 (1948).*

In the instant case, as in *Commonwealth, supra,* it is sufficient that one member of the panel of arbitrators is tainted to vacate the award. One can never know the deleterious effect of the failure to disclose an arbitrator's interest or bias upon the deliberations of the panel when the other members erroneously continue to believe that their colleague was impartial.**

It should not, however, be a bar to this Court's consideration that petitioner did not complain about the conversations between himself and the chairman. The practical realities of the situation require a *"per se"* rule disqualifying arbitrators who do business with parties during the pendency of an arbitration. An inherently coercive atmosphere prevails when an arbitrator overreaches; the fear that accusing a "respected fellow member" of one's business community of misconduct would lead to ostracism. The arbitrator's probable reaction would be an outraged denial.

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*Whether the arbitration proceeding itself can be considered state action is an open question, *Austern v. Chicago Board Options Exchange, Inc.,* 716 F. Supp. 121, 125 (S.D.N.Y. 1989) [where the District Court relied upon *N.C.A.A. v. Tarkanian,* 488 U.S. 179, 197-198 (1988) in answering in the negative.] aff'd on other grounds, 898 F. 2d 882 (2d Cir.), Cert. den. ____ U.S. ____, 112 L Ed 2d 107 (1990). However, there has never been any question that the actions of the state courts are subject to scrutiny under the Fourteenth Amendment, *Mitchum v. Foster,* 407 U.S. 225, 240-241 (1972); *Dennis v. Sparks,* 449 U.S. 24, 28 (1980).

**It should be noted that while the Court in *Commonwealth* imposed this rule on arbitrators, as a matter of statutory interpretation, it has reserved the constitutional question for future adjudication as to multi-member courts, *Aetna Life Ins. Co. v. Lavoie, supra,* 475 U.S. at 827-828.

The contest of credibility would never be resolved. Cf. *Matter of J. P. Stevens & Co. (Rydex Corporation),* 34 N Y 2d 123, 131, 356 N.Y.S.2d 278, 284, 312 N.E.2d 466, 470 (1974), Wachtler, J., dissenting: "I believe this court should lay down a rule that an arbitration proceeding may be vacated for alleged bias *only if the information brought to light after the proceeding could not have been discovered with due diligence before the proceeding.*" (Emphasis added)

Such silence was not a waiver. It has long been settled by this Court that a constitutional right is not waived, except by deliberate, knowing behavior: "A waiver is ordinarily intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). See also, *Illinois v. Allen,* 397 U.S. 337, 343 (1970). Moreover, as this Court noted in its recent decision in *Arizona v. Fulminante,* ____ U.S. ____ 59 U.S.L.W. 4235, 4237 (1991), trying a defendant before a biased judge is a constitutional defect that can never be "harmless". This overriding principle of fair and unbiased decision making is fully applicable here.

Thus, it is urged that a proper reading of the *Commonwealth Coatings, Tumey, Lavoie* and *Liljeberg* cases requires the conclusion that the same constitutional disqualification for ongoing business dealings or pecuniary interest applies equally to arbitrators as to judges. That this is an issue of national significance is evidenced by the fact that "partiality" or "misconduct" of an arbitrator as grounds for vacating an award are contained not only in N.Y.C.P.L.R. 7511(b)(i)(ii), but also in the Federal Arbitration Act, 9 U.S.C. § 10(b), other state arbitration laws which are based upon New York Law, see 8 Weinstein, Korn & Miller, N.Y. Civil Prac. para. 7501.02 (1990), and in the Uniform Arbitration Law which has been adopted by 32 states and the District of Columbia, 7 ULA Master Edition Supp. p. 1 (West Pub. Co., 1990) and Unif. Arb. Law §12(a)(2). How-

ever, the results reached in the courts below in this case, as well as other state cases, in attempting to deal with such issues reveal a confusion that requires this Court to state the law with certainty.

Commonwealth Coatings was followed very closely in *Northwest Mechanical, Inc. v. Public Utilities Commission of City of Virginia,* 283 NW 2d 522, 524 (Minn. 1979), where the failure of the "neutral" arbitrator to disclose prior business dealings with an arbitrator nominated by a party and that party was ground for vacatur—even in the absence of actual subjective prejudice. *Richo Structures v. Parkside Village, Inc.,* 82 Wis.2d 547, 263 NW 2d 204, 211-12 (1978) reached a similar result when an arbitrator failed to disclose prior relationships with a party and another arbitrator.

In *Hartman v. Cooper,* 59 Md. App. 154, 474 A 2d 959, 962, 965-67 (Ct. Spec. Apps. 1984) rev'd on other grounds, 311 Md 259, 533 A 2d 1294 (1987), the award of a medical malpractice arbitration panel was vacated where one of the physician panelists failed to disclose that he had once been sued for malpractice and had testified at two depositions on behalf of other defendant doctors. But cf. *Wyndam v. Haines,* 305 Md. 269, 503 A 2d 719, 724 (1986), which upheld the denial of a vacatur because of a failure of proof that the chairman of the arbitrators, an attorney, who was the adversary of the doctor's attorney in two unrelated cases, was biased.

Another approach is reflected in the New York Court of Appeals' rule that the "substantiality" of the prior dealings will determine what kinds of undisclosed facts will constitute the basis for the vacatur, with cases turning largely on their facts, *Matter of J. P. Stevens & Co. (Rytex Corporation), supra,* 34 NY 2d at 127, 356 N.Y.S. 2d at 281, 312 N.E. 2d at 468.

Thus the varying standards of review and varying interpretations of similar statutes whose applications have constitutional import demonstrate the need for review and the establishment of a nationwide standard.

Commercial arbitration was once a barely tolerated, judicially mistrusted process, *Wilko v. Swan,* 346 U.S. 427 (1953), overruled, *Rodriguez de Quijas v. Shearson/American Express,* 490 U.S. 477, 484-85 (1989). It is now a favored alternate means of civil dispute resolution, *Volt Info. Sciences, Inc. v. Leland Stanford Jr. Univ.,* 489 U.S. 468 (1989); *Rodriguez de Quijas v. Shearson/America Express, supra, Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 232 (1987), *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth,* 473 U.S. 614, 628 (1985). Moreover, the indulgence with which this Court has favored arbitration assumes the fundamental fairness of the process, *McMahon, supra,* 482 U.S. at 232; *United Paperworkers International Union v. Misco, Inc., supra.* One need not quarrel with the policy of allowing arbitration to be a flexible process tailored to the needs of a particular industry or to the desires of the parties, *Volt Info. Sciences, Inc. v. Leland Stanford Jr. Univ., supra.* However, as long as private bodies invoke the power of the state, through its courts, to enforce an arbitrator's award or to give it *res judicata* effect, petitioner submits that the state is constitutionally obligated to proceed within the boundaries of due process. Cf. *Ufheil Constr. Co. v. Town of New Windsor,* 478 F. Supp. 766, 768 (S.D.N.Y. 1979) aff'd 636 F. 2d 1204 (2d Cir. 1980). See also, *Mitchum v. Foster, supra; Shelley v. Kraemer, supra.* Its failure to do so in the instant case warrants the attention of this Court, not merely for the sake of this petitioner, but also to settle an important point of law.

Petitioner submits that it is time to declare a national public policy that no state may enforce an arbitration

award where an arbitrator had engaged in a business transaction with a party during the arbitration process. This Court has long recognized that a contract countenancing "violations of obvious ethical or moral standards" is contrary to public policy and will not be enforced, even in the absence of specific legislation, *Muschany v. United States,* 324 U.S. 49, 66-67 (1945). In the instant case, the chairman of the appeal panel took advantage of his position to commence a relationship with the petitioner in the apparent expectation of an undue advantage, to the petitioner's detriment.

To permit the judgment herein to stand would signal all arbitrators operating under the auspices of private trade associations or other voluntary arbitration organizations that they may engage in dealings with a party in a pending arbitration, in utter disregard of the most fundamental standards of objectivity and fairness. A failure of this Court to act would discourage the submission of disputes to arbitration, prompting honest litigants to resort to the already overburdened judicial system; contrary to the national public policy of encouraging arbitration, *United Paperworkers International Union v. Misco, supra,* 484 U.S. at 42-43; *W. R. Grace & Co. v. Rubber Workers,* 461 U.S. 757, 766 (1983).

For these reasons, the rule set forth in *Commonwealth Coatings, supra,* should be held a rule of constitutional due process and be applied to ongoing as well as prior business relationships.

Conclusion

A writ of certiorari should be granted.

Dated: New York, New York
April 26, 1991

Respectfully submitted,

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APPENDIX

Order of the New York Court of Appeals, March 27, 1991 Denying Re-Argument and Amendment of its Prior Order

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of March A.D. 1991

Present,

Hon. Sol Wachtler, Chief Judge, presiding

MO. NO. 247

IN THE MATTER
OF

MOTI NAMDAR,

Respondent,

v.

ELI MIRZOEFF,

Appellant.

A motion for reargument of motion for leave to appeal to the Court of Appeals and for amendment of this Court's

order dated February 7, 1991 in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

DONALD M. SHERAW
Clerk of the Court

Order of the New York Court of Appeals, February 7, 1991, Denying Leave to Appeal

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of February A.D. 1991

Present,

Hon. Sol Wachtler, Chief Judge, presiding

1-10 Mo. No. 1283

IN THE MATTER
OF
MOTI NAMDAR,

Respondent,

v.

ELI MIRZOEFF,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

DONALD M. SHERAW
Clerk of the Court

Order of the Appellate Division, October 2, 1990, Denying Leave to Appeal

At a term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department in the County of New York, entered on October 2, 1990.

Present:

Theodore R. Kupferman, Justice Presiding
Joseph P. Sullivan
David Ross
John Carro
Bentley Kassal, Justices

IN THE MATTER
OF

The Arbitration of Certain Controversies Between
MOTI NAMDAR,
Petitioner-Respondent,

against

ELI MIRZOEFF,

Respondent-Appellant.

M-3043
[39672]

Respondent-appellant having moved for leave to appeal to the Court of Appeals from an order of this Court entered on May 10, 1990,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion be and hereby is denied, with $100 costs.

ENTER:

FRANCIS X. GALDI
Clerk

Opinion of the Appellate Division, May 10, 1990, Affirming Confirmation of Arbitrator's Award

In the Matter of the Arbitration between Moti Namdar, Respondent, and Eli Mirzoeff, Appellant.—Order and Judgment (one paper), Supreme Court, New York County (Karla Moskowitz, J.), entered January 20, 1989, which confirmed an arbitration award rendered on February 12, 1988 by a unanimous five-member appeal committee of the Diamond Dealers Club, Inc. in favor of petitioner for the sum of $64,767.91, is unanimously affirmed, with costs.

The underlying facts of this case concern the sale of a sapphire sold by Moti Namdar and Shmuel Nissim to Eli Mirzoeff. The arbitrators subsequently determined that Mirzoeff owed Namdar the negotiated price of the sapphire. Namdar moved to confirm the award. Mirzoeff opposed the motion alleging that the arbitrators were prejudiced against him, the award was irrational and the arbitration proceeding was marred by procedural irregularities. The IAS court granted the petition to confirm the award and rejected Mirzoeff's contentions.

Courts have fostered a clear judicial policy in favor of non-interference in arbitration proceedings. (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623.) In a consensual arbitration such as this one, arbitrators are not bound either by principles of substantive law or the rules of evidence. (*Matter of Silverman [Benmore Coats]*, 61 NY2d 299, 308.) Rather, the burden of proof is on the party alleging the misconduct and such misconduct must be proven "clear[ly] and convincing[ly]". (*Matter of Weiner Furniture Co. [Kingston City Schools Consol.]*, 90 AD2d 875.) Upon our review of this record, we conclude that Mirzoeff has not sufficiently demonstrated his allegations of the arbitrator's misconduct.

A party who proceeds with an arbitration with actual knowledge of bias on the part of an arbitrator or facts that

should have prompted further inquiry, waives his objection to the arbitration. (*Matter of Stevens & Co. Inc. [Rytex Corp.]*, 34 NY2d 123, 129.) In this case, the alleged prejudice of the arbitrators was known to Mirzoeff before completion of the arbitration proceeding. Mirzoeff, however, did not raise the alleged bias until well after the arbitration award was rendered. Accordingly, the claims relating to the arbitrators' alleged prejudice have been waived. (*See, Matter of Siegel [Lewis]*, 40 NY2d 687, 690.)

We have considered Mirzoeff's other claims and find them to be meritless. Concur—Kupferman, J. P., Sullivan, Ross, Carro and Kassal, JJ.

Order of the Appellate Division, May 10, 1990

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 10, 1990.

Present - Hon. Theodore R. Kupferman, Justice Presiding
Joseph P. Sullivan
David Ross
John Carro
Bentley Kassal, Justices.

39672

IN THE MATTER
OF

The Arbitration of Certain Controversies between
MOTI NAMDAR,

Petitioner-Respondent,

against

ELI MIRZOEFF,

Respondent-Appellant.

An appeal having been taken to this Court by the respondent-appellant from an order and judgment (one

paper) of the Supreme Court, New York County (Karla Moskowitz, J.), entered on January 20, 1989,

And said appeal having been argued by Hyman Bravin of counsel for appellant, and by Benjamin P. Eisenberger of counsel for petitioner-respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order and judgment (one paper) so appealed from be and the same hereby is affirmed. Petitioner-respondent shall recover of respondent-appellant $250 costs and disbursements of this appeal.

ENTER:

FRANCIS X. GALDI
Clerk.

Decision of Justice Karla Moskowitz, Confirming Arbitration Award, August 12, 1988

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

IAS Part 25

IN THE MATTER
OF

The Abbitration Of Certain Controversies Between
MOTI NAMDAR,

Petitioner,

against

ELI MIRZOEFF,

Respondent.

Index No. 7818/88

KARLA MOSKOWITZ, J.:

Petitioner Moti Namdar seeks to confirm an arbitration award of $59,378.00 pursuant to CPLR Article 75 rendered by a unanimous arbitration tribunal in his favor. Respondent Eli Mirzoeff opposes the confirmation and cross-moves to vacate the award. On his cross-motion, respondent contends that the arbitration award should not be confirmed because the award of the appeals panel was irrational; the arbitration panel and chairman were biased against him; and the arbitration was marred by substantial

procedural irregularitites which denied him even a semblance of due process.

The courts of this state have a clear policy in favor of not interfering with awards arising out of arbitration proceedings because they are desirable alternatives to litigation. *See, Apuzzo v. County of Ulster,* 98 AD2d 869 (3rd Dep't 1983). Because of this policy of non-intervention, the grounds for vacating an award under CPLR §7511 (b) are limited. CPLR 7511 (b) (1) (ii) states that "The award shall be vacated . . . if the court finds that the rights of that party were prejudiced by partiality of an arbitrator appointed as a neutral . . . ." Even where partiality is at issue, however, it may only be grounds for vacator because of an *undisclosed* relationship or interest between the neutral arbitrator and party. *Siegel v. Lewis,* 40 NY2d 687, 690.

In this proceeding respondent alleges that the entire arbitration panel and the chairman in particular were biased against him. He claims the panel was biased because it received statements during the proceedings to the effect that respondent brought criminal charges against a fellow in a separate matter. Because it is highly unusual for Orthodox Jews to bring criminal charges against each other and the members of the arbitration panel were Jewish, respondent claims that this was highly prejudicial to him.

Respondent also alleges that the chairman was biased against him because of a business dealing between himself and the chairman during the arbitration. This dealing caused the chairman to become dissatisfied with him and lead to "difficulties" at the arbitration.

Assuming, *arguendo,* that respondent's allegations concerning the partiality of the arbitration panel are true, petitioner correctly contends that by continuing to participate in the arbitration with full knowledge of partiality, respondent waived his claim. CPLR 7511 (b) (1) (iv); *Sterling Cheek v. Chubb & Son, Inc.,* 70 AD2d 622 (2d Dep't

1979); *see also, J.P. Stevens & Co. Inc. v. Rytex Corp.*, 34 NY2d 123. Moreover, courts have applied this rule when the specific allegations of bias affect only one of the arbitrators. *See, Lastmore Prod. Mfg. Corp. v. Storozum*, 279 App. Div. 748 (2d Dep't 1951); aff'd 304 NY 597; *St. George Textile Corp. v. Brookside Mills Inc.*, N.O.R. 85 NYS2d 62; (Sup Ct New York County 1948).

Respondent further claims that the arbitration was "marred by substantial and procedural irregularities." Respondent alleges that the arbitrators predicated their award on independent investigation. However, respondent has not supported any of these allegations. He has failed to sustain his burden of proof by a standard of "clear and convincing" evidence. *Goltz v. Ripps*, 88 AD2d 1052 (3rd Dep't 1982). Respondent also points to the arbitrators' refusal to permit respondent to present pertinent and material evidence. In particular, he claims that his secretary, Ms. Sharma, was prevented from testifying. This is contradicted by two affirmations submitted to the court by petitioner which claim that respondent never asked to call Ms. Sharma as a witness.

Even if respondent's claim were true, it does not warrant vacatur of the award. The Court of Appeals has stated that arbitrators are not bound by principles of substantive law or rules of evidence absent a provision in the arbitration clause. The papers before the court do not reveal such a provision. *Silverman v. Benmor Coats Inc.*, 61 NY2d 299.

Respondent also claims that the award should be vacated because it was irrational. The irrationality, he claims, is because Nissan commenced the proceeding, but the award was granted to petitioner (Namdar). Respondent overlooks the fact that the proceeding was commenced and maintained by Nissan and Namdar together. (See, Submission to Arbitration, Exhibits "A" and "B" to petition).

Accordingly, petitioner's application to confirm the award of the arbitration is granted. Respondent's cross-motion to vacate the arbitration award is denied.

Accordingly, petitioner's application to confirm the award of the arbitration is granted. Respondent's cross-motion to vacate the arbitration award is denied.

The Clerk is directed to enter judgment confirming the arbitration award in favor of petitioner together with costs disbursements and interest from February 12, 1988.

Dated: August , 1988

K. M.
J. S. C.

Filed Aug 12 1988
N.Y. Co. Clk's Office

Order and Judgment Confirming Arbitrator's Award, December 7, 1988.

At an I.A.S. Part 25, of the Supreme Court of the State of New York, held in and for the County of New York, at 60 Centre Street, New York, New York, on the 7th day of December 1988.

Present:

Hon. Karla Moskowitz, Justice

IN THE MATTER

OF

The Arbitration of Certain Controversies Between MOTI NAMDAR,

Petitioner,

against

ELI MIRZOEFF,

Respondent.

Order & Judgment

Index No.: 7818/88

The Petitioner, MOTI NAMDAR, having applied for confirmation of the award in arbitration herein, signed and

acknowledged on the 12th day of February, 1988, a copy of which is annexed hereto, whereby Petitioner was awarded the sum of Fifty-Nine Thousand Three Hundred and Seventy-Eight ($59,378.00) Dollars, and

Respondent, ELI MIRZOEFF, having applied by cross-petition for a vacatur of the award; and

NOW, upon reading and filing the notice of petition dated the 7th day of April, 1988, the petition verified the 1st day of April, 1988, with proof of due service of the notice of petition and petition, and the award signed and acknowledged on the 12th day of February, 1988, all in support of the application to confirm the arbitration award; the Respondent's answer and cross-petition verified the 1st day of April, 1988 and the affidavit of ELI MIRZOEFF sworn to on the 21st day of April, 1988, with exhibits annexed thereto, in support of the cross-petition and in opposition to the petition to confirm; the affidavit of MOTI NAMDAR sworn to on the 28th day of April, 1988, the affirmation of Benjamin P. Eisenberger, Esq. dated the 28th day of April, 1988 and the affirmation of Benjamin P. Eisenberger dated May 26, 1988, with exhibits annexed thereto, in further support of the application to confirm and in opposition to the cross-petition to vacate; the affidavit of Abe Kaufman, verified the 29th day of April, 1988, with exhibits annexed thereto, in support of the petition to confirm and in opposition to the cross-petition to vacate; and the affirmation of Hyman Bravin, Esq. date[d] the 19th day of May, 1988, with exhibits annexed thereto in opposition to the petition to confirm and in support of the cross-petition to vacate; and after hearing Lewisohn, Eisenberger & Fuchs, attorneys for Petitioner in support of the application to confirm and in opposition to the cross-petition to vacate and Baer, Marks & Upham attorneys for Respondent, in opposition to the petition to confirm and in support of the cross-petition to vacate; and due deliberation having been had and the Court having made and filed its written decision herein date the 4th day of August, 1988.

NOW, on motion of Lewisohn,, Eisenberger & Fuchs, attorneys for Petitioner, it is

ORDERED, that the application to confirm the arbitration award be and the same hereby is granted, and it is further

ORDERED, that the application to vacate the arbitration award be and the same hereby is denied, and it is further

ORDERED, that the award of the arbitrators acknowledged on the 12th day of February, 1988 be and the same hereby is confirmed; and it is further

ORDERED AND ADJUDGED, that the said Petitioner, MOTI NAMDAR, residing at 20 West 47th Street, New York, New York, do recover of the Respondent, ELI MIRZOEFF, residing at 82-05 Beverly Road, Kew Gardens, New York, the sum of Fifty-Nine Thousand Three Hundred and Seventy-Eight ($59,378.00) Dollars with interest thereon from the 12th day of February, 1988 in the sum of ($5,017.41) Dollars together with costs and disbursements as taxed in the sum of ($372.50) Dollars, making in all the sum of ($64,767.91) Dollars, and that the Petitioner, MOTI NAMDAR have execution therefore.

Dec 07 1988

ENTER

KARLA MOSKOWITZ
J.S.C.

NORMAN GOODMAN
Clerk

Filed
January 20, 1989
County Clerk's Office
New York

Appeal Committee Arbitration Decision
February 12, 1988

ARBITRATION TRIBUNAL OF THE DIAMOND DEALERS CLUB, INC.

SHMUEL NISSIM & MOTY NAMDAR

vs.

ELI MIRZOEFF

The Appeal Committee, acting herein, having heard all of the evidence and having fully considered all of the facts, renders and affirms its decision as follows:

Mr. Eli Mirzoeff shall pay the sum of $59,378.00 to Mr. Moty Namdar. This sum shall be paid within thirty (30) days of date of this decision.

This shall settle all claims made in this arbitration.

This decision shall be carried out in accordance with Article XII of the By-Laws of the Diamond Dealers Club, Inc.

APPEAL COMMITTEE

ABE KAUFMAN, CHMN.
JACK FINK, CHMN.
SOL HOFSTATTER, CHMN.
ABE KOHL
HENRI VERSTANDIG

(Acknowledgement Omitted)

Original Three-Member Panel Arbitration Decision
June 23, 1987.

MOTY NAMDAR and SHMUEL NISSIM

vs

ELI MIRZOEFF

The Arbitration Committee, acting herein, having heard all of the evidence and having fully considered all of the facts renders and affirms its decision as follows:

The panel is hereby dismissing the complaint of plaintiffs Shmuel Nissim and Moty Namdar against Eli Mirzoeff on the merits.

The panel has severed the counterclaim of Eli Mirzoeff against Shmuel Nissim from this matter and has not heard and determined this counterclaim. Eli Mirzoeff has the right to file a new claim in this regard.

This decision shall be carried out in accordance with Article VI, Section 9 and Article XII, Section 19 of the By Laws of the Diamond Dealers Club, Inc. Appeals may be made in the manner presented by Article XII, Sections 14 and 15.

ARBITRATION COMMITTEE

Joe Gross, Chmn. Moshe Taub

Eddie Volkman

(Acknowledgement Omitted)

Affidavit of Eli Mirzoeff, Sworn to April 21, 1988, Par. 6

* * *

6. In addition, one of the members of the Panel, Mr. Kaufman, during the pendency of the arbitration, which took place over two days separated by a short hiatus, approached me and asked to purchase from me a diamond ring I was wearing. Mr. Kaufman indeed came to my office and made an offer for the ring which I refused as too low. Thereafter Mr. Kaufman approached me at the Diamond Dealers Club and noted that I should accept his earlier offer or "I knew what would happen in the next few days"—meaning of course that should I not accept his offer, I would suffer at my pending arbitration.

* * *

Affidavit of Abe Kaufman, Sworn to April 29, 1988, Paragraphs 4, 5, 8, 15-22.

* * *

4. The Diamond Dealers Club is a membership, not-for-profit corporation organized under the laws of the State of New York since 1931. Its approximately two thousand members elect thirty-two arbitrators from among the membership who serve to hear and decide disputes between its members without remuneration.

5. I am honored to have been elected as an arbitrator by my fellow members of the Diamond Dealers Club and to have served as an arbitrator since January, 1981. Since that time, I have served on many panels and I have heard dozens of cases. More recently, I was designated as a chairman of the Arbitration Panel selected by both the Petitioner and Respondent in this case.

* * *

8. The Arbitration Panel members are not paid for their services but consider it a high honor to be elected by their peers to this honorable position. The parties have the right to be represented by counsel, participate in the selection of arbitrators, and have the right to appeal to an Appeal Arbitration Panel of the Diamond Dealers Club. The parties have a right to present all of their evidence and witnesses without any element of bias or prejudice. The system of arbitration in the Diamond Dealer Club is embodied in the by-laws of the club under Article XII and Article VII, as amended, copies of which are annexed hereto for the Court's reference.* Each member agrees at the time of submitted [*sic*] his application for membership to be bound by the by-laws and the arbitration rules. Since the panel members are all active, and usually leading members of the diamond dealers community, members of the panel often

*Omitted herein.

have conducted business with other members of the club who may be claimants and respondents. Even the arbitrators themselves, as active diamond dealers are often claimants and respondents before the Diamond Dealer Arbitration Tribunals.

* * *

15. It has come to my attention that Mr. Mirzoeff has made certain allegations regarding a purported business transaction between the two of us. Since these charges are a personal attack on my integrity, I feel compelled to respond and to set forth a detailed statement of exactly what transpired for the Court's information.

16. Approximately one week prior to the date of the first hearing (and after the selection of arbitrators by Mr. Mirzoeff and Mr. Namdar) Mr. Mirzoeff saw me in the hallway of the eleventh floor of the Diamond Dealers Club outside of the executive offices of the Club (Mr. Mirzoeff's offices are located directly across the hall from the executive office[s] of the Club). Mr. Mirzoeff approached me and informed me that he was recently shown a diamond ring by one of his customers and he was thinking of buying it. Since Mr. Mirzoeff primarily deals with colored stones, he asked for my expertise to help him evaluate a diamond ring. It is common practice among diamond dealers to ask their colleagues for advice as to valuation of stones. We went to his office so that I could examine the diamond ring more closely and I told him that in my opinion it was worth about $20,000.00. Mr. Mirzoeff then asked me if I would buy it at that price. Among diamond dealers this question is not so much an offer to sell as it is a means to verify whether the opinion as to value stated by a colleague is indeed accurate. I replied that I would be interested in buying it at that price. He replied he would let me know.

17. Nothing further was discussed between Mr. Mirzoeff and myself until a chance meeting in the elevator in the Diamond Dealers Club building sometime after the first hearing of January 26, 1988 and prior to the second hearing date of February 9, 1988. Mr. Mirzoeff said that he was still working on the ring. I said "O.K." Nothing further was said by either of us.

18. The arbitration panel concluded its hearings on February 9, 1988 and rendered and delivered a decision in writing to the parties on February 10, 1988. Several days after the arbitration decision was rendered, Mr. Mirzoeff's secretary, Rohana, called me and informed me that Mr. Mirzoeff would be interested in selling the stone for $20,000.00, and asked if I would be interested in buying it. I replied that I would like to weigh the stone and ascertain its exact weight and that I would like to show it to another person.

19. We arranged to meet at the Club and Rohana brought the diamond with her. I took the diamond into the Club to show to my uncle for his opinion about the value. However, I wanted to make sure that it was indeed ten carats and since it was mounted I asked her permission if I could take it out of its mounting to verify the weight. The Diamond Dealers Club has official weight scales available to its members for weighing diamonds. She replied that since it was their client's stone she would have to obtain permission from the client to take the stone out of its mounting. She then left with the stone.

20. I heard nothing further until I met Mr. Eli Mirzoeff in the elevator again by chance. Mr. Mirzoeff said that he would have to request permission of the owner of the stone to take it out of its mounting and that he would let me know. After that encounter in the elevator I never heard again from Mr. Mirzoeff.

21. In all of the brief conversations had with Mr. Mirzoeff and his secretary, there was no mention or discussion of the arbitration proceeding. In fact, the offer to sell the ring to me, although quite conditional, came after the arbitration proceeding had been concluded and a decision had been rendered. At no time did I initiate any conversations regarding the purchase of this ring. In fact, there was never any negotiation concerning the price. In fact, I felt that Mr. Mirzoeff was pushing the stone. I did not pursue him. I had not great interest in this ring as this ring would represent a very small transaction, in terms of price, for my company.

22. Contrary to Mr. Mirzoeff's allegations, I never approached him to purchase the diamond ring. There were no negotiations about the price. I made no threats, implied or otherwise and further, we never discussed anything involving the arbitration. Certainly, I never made the statement attributed to me by Mr. Mirzoeff. In light of the foregoing, I was quite shocked to read of Mr. Mirzoeff's allegations contained in this affidavit submitted to oppose confirmation of the award. There is simply no truth to the quotation he attributes to me. It would seem logical that if Mr. Mirzoeff's statement was true, he would have complained at the time of the second arbitration hearing date. It is patently obvious that if such a scenario actually transpired, Mr. Mirzoeff would have informed his attorney and his attorney would have raised this matter at the next arbitration sessions. Mr. Mirzoeff failed to do this for the simple fact that the statement attributed to me was never stated. These charges are simply bitter grapes by a dissatisfied litigant.

Affirmation of Hyman Bravin, dated May 19, 1988, par. 3.

3. I read carefully the responding affidavit of Abe Kaufman ("KAUFMAN"), sworn to April 29, 1988, who served as Chairman of the DDC Appeal Committee, responding to allegations contained in MIRZOEFF's affidavit of April 21, 1988 about his and MIRZOEFF's negotiations concerning a 10 ct. diamond ring. I represent that I knew nothing about the *ex parte* meetings between KAUFMAN and MIRZOEFF until I had a meeting with MIRZOEFF when I informed him that I could not represent him in this Supreme Court proceeding to disaffirm the DDC award because of my trial engagements. I[t] was at that time that I first learned that MIRZOEFF had negotiated the sale of such 10 ct. diamond ring with KAUFMAN.

It is pertinent and appropriate at this time to call to the attention of the Court that reference was made in NAMDAR's affidavit and in his attorney's affidavit that I was a former DDC General Counsel. I served in that capacity from January 1980 through June 1985. KAUFMAN makes reference to an alleged practice that is *currently* followed by DDC members presiding over quasi-judicial proceedings. I would like to feel that the strong ethical position I espoused while DDC General Counsel is still in practice, despite KAUFMAN's statement:

> ". . . Since the panel members are all active, and usually leading members of the diamond dealers community, members of the panel often have conducted business with other members of the club who may be claimants and respondents."

On a number of occasions from 1980 to about 1983, when the newly elected arbitrators were installed, I would deliver a talk to all 32 arbitrators, counselling them on how

to conduct themselves as arbitrators, and on certain situations to avoid. Invariably, I cautioned them not to do business with and to remain aloof from any DDC members who were presently in an arbitration case before them as an arbitrator. I asked them what kind of justice did they think one would get from a Judge who had their case, if they were to see him eating with their adversary's lawyer in a public restaurant during the trial period.

At that time, I pointed out that, while they might be losing business, they should remember that they had assumed a responsibility of great honor and service to the diamond community. I further explained that, when Judges preside in a case (even though they may know the lawyers), they go out of their way not to communicate with the lawyers or be seen with them during the period of time the case is before the Judge. *I emphasized this high standard must be followed*; although I recognized that some courts in limited cases may have indicated that it was not inappropriate to continue to do business with someone who is appearing before you in your role as an arbitrator. On a number of other occasions, I cautioned the arbitrators to be painfully aware that, when some fellow DDC dealer had a matter before an arbitration Panel and knew they were elected arbitrators, that dealer might attempt to ask them to speak on his behalf to another member of the Panel.

I was pragmatic enough to recognize (and admitted to the arbitrators) that no one could police them in their activities, but that this was a matter of justice and honor.

In my professional opinion, it is "misconduct", as contemplated by the State Legislature when they enacted CPLR 7511(b) for an arbitrator to engage in an *ex parte* business transaction with a party who is appearing before him in an arbitration proceeding.

Supreme Court, U.S.
FILED
JUN 6 1991
OFFICE OF THE CLERK

(2)

No. 90-1705

In The

Supreme Court of the United States

October Term, 1990

ELI MIRZOEFF,

Petitioner,

vs.

MOTI NAMDAR,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department

BRIEF IN OPPOSITION FOR RESPONDENT

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No. 90-1705

In The

Supreme Court of the United States

October Term, 1990

ELI MIRZOEFF,

Petitioner,

vs.

MOTI NAMDAR,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Petitioner and respondent, both members of the Diamond Dealers Club (DDC), submitted a controversy to a private, voluntary arbitration before an arbitration tribunal of the DDC. The five-member neutral arbitration panel was selected by the parties, and consisted of three chairman and two additional arbitrators.

It was undisputed that respondent had delivered a sapphire to petitioner on a "memorandum" basis. A memorandum serves as a receipt and a contract and its terms may not be contradicted by parol. *Lipschutz v. Gordon Jewelry Corp.* 373 F. Supp. 375, 387 (S.D. Tex. 1974). Respondent commenced the arbitration proceeding when petitioner refused to return the gem. Petitioner contended that he had returned the gem to respondent's brother-in-law in a chance encounter in an elevator but neglected to request return of the signed memorandum. Respondent produced the signed original memorandum at the arbitration (6ra).[1] The arbitrators held hearings over the course of two days and both parties, represented by their respective counsel, offered testimony and conducted cross-examination (22a, 4ra). Petitioner was represented by the former general counsel to the DDC (24a).

The panel unanimously rendered an award in respondent's favor. A key factor compelling the award was petitioner's failure to comply with a DDC by-law relating to custom and usage. Specifically, Section 4 of Article XIX of the by-laws provides as follows:

> Memorandums. No goods shall be given or received without a signed memorandum, and any return of goods must be acknowledged in writing or by the return of the signed memorandum.

(6ra).

Respondent commenced an Article 75 proceeding under the New York Civil Practice Law and Rules to confirm the arbitration award. Petitioner opposed confirmation on the following grounds: that the arbitrators were *all* biased against petitioner based on

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1. The designation "ra" preceded by a page number refers to respondent's appendix; "a" refers to petitioner's appendix.

petitioner's subjective interpretation that he violated the tenets of his religious faith by initiating criminal charges against a fellow member of his faith; that errors were committed in evidentiary rulings; that one of the arbitrators allegedly conducted an "independent investigation"; and that petitioner had not entered into a contract with respondent (10-13a).[2]

In addition, petitioner alleged that one of the five arbitrators, Kaufman, allegedly asked to purchase a diamond ring he was wearing. This allegation was devoid of any detail except that petitioner rejected the arbitrator's offer as "too low". The ask and bid prices were not furnished. Significantly, petitioner had continued with the arbitration without raising any objection and without informing anyone of the allegations.

In response to this allegation, Kaufman submitted a detailed factual affidavit denying that any negotiations took place during the pendency of the arbitration proceeding (20-23a, 4-5ra). Petitioner did not reply to the arbitrator's affidavit although he submitted an affirmation by his former attorney which did not contradict Kaufman's affidavit (24-25a).

The trial court rejected petitioner's latter claim on several grounds (10-13a). The court found that petitioner had failed to sustain his burden of proof with respect to the arbitrator's alleged misconduct by a standard of "clear and convincing" evidence. Additionally, the court held that under New York law, a disclosed relationship (in contrast to an undisclosed relationship) between a party and an arbitrator may not form the basis for vacatur of the award on the grounds of "partiality" if the objecting party selected the arbitrator and voiced no objection to the disclosed facts. The facts complained of here, were clearly disclosed to

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2. These grounds were rejected by the lower court and the Appellate Division and are not presented for review to this Court.

petitioner (although undisclosed to respondent). Finally, the lower court held that petitioner waived his claim by continuing to proceed with the arbitration without objection. The court found that the doctrine of waiver was particularly appropriate where Kaufman's vote was surplusage in a five to none decision.

A five-member panel of the Appellate Division unanimously affirmed the order and judgment of the trial court. Significantly, that court made the following key finding of fact:

> Upon our review of this record, we conclude that Mirzoeff has not sufficiently demonstrated *his allegations of the arbitrator's misconduct*.

(6a) (emphasis added).

The frivolous and misleading nature of the petitioner's present position is characterized by his allegation that the reference in the court's decision to the failure of proof refers to issues "not presented herein" (Pet. for Cert. at 8). The Appellate Division, clearly, and beyond any shadow of a doubt, did find a failure of proof with regard to petitioner's "allegations of the arbitrator's misconduct."

Petitioner's argument that this Court is not bound by the Appellate Division's factfinding and request that this Court "scrutinize" the record is disingenuous in light of the petitioner's failure to reproduce here the complete record, or at the very least, the relevant parts thereof. By omitting over ninety percent of the record and taking the cutting knife to affidavits in presenting isolated paragraphs of affidavits out of context, petitioner cannot be serious about having this Court "scrutinize" the record. Petitioner's "statement of facts" deviates from the facts presented in the record before the lower court and the Appellate Division. For example, it was not "undisputed" that Kaufman negotiated

with petitioner for the sale of a ring while the arbitration was pending.

Finally, and of critical importance on this application, petitioner has not preserved his Fourteenth Amendment due process violation claim since this claim was never raised at any level of the proceedings. While there may have been a casual and indirect reference to the "due process clause" in petitioner's appellate brief, there was certainly no mention of the Fourteenth Amendment to the United States Constitution. Petitioner never briefed this point, and petitioner did not raise these points in his proposed certified questions on motions for leave to appeal to the Appellate Division and to the Court of Appeals (1-3ra).

The Fourteenth Amendment due process claim was first raised on petitioner's motion for *rehearing* of the Court of Appeals' denial of his motion for leave to appeal to that court. In the motion for rehearing, petitioner also moved for amendment of the court's remittitur, to provide that the constitutional issue had been "necessarily raised and considered." That motion was denied.

REASONS FOR DENYING THE WRIT

I.

Absence of State Action

It is undisputed that a private, *voluntary* arbitration such as the one herein cannot be considered state action for the purposes of a due process deprivation claim under the Fourteenth Amendment. *Austern v. Chicago Board Options Exchange, Inc.* 716 F. Supp. 121, 125 (S.D.N.Y. 1988) (where the District Court relied upon *N.C.A.A. v. Tarkinian*, 488 U.S. 179, 197-198 (1988) "protections of the Fourteenth Amendment do not extend to private conduct abridging individual rights."), *aff'd on other grounds*, 898 F.2d 882 (2nd Cir.), *cert. denied*, ___ U.S. ___, 112 L. Ed. 2d 107 (1990); *F.D.I.C. v. Air Florida System Inc.*, 822 F.2d 833, 842 at fn. 9 (9th Cir., 1987), *cert. denied*, 485 U.S. 987 (1988); *Elmore v. Chicago Illinois Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986).

The mere confirmation of the arbitration award by the state court standing alone, cannot be considered state action. A party who has obtained a state court order or judgment is not engaged in "state action" merely because it used the state court legal process. *Cobb v. Georgia Power Co.*, 757 F.2d 1248, 1251-1253 (11th Cir. 1985).

The Circuit Court in *Cobb, supra*, in considering state action under a § 1983 action, distinguished *Dennis v. Sparks*, 449 U.S. 24 (1980) relied on by petitioner, since that case involved an allegation of a conspiracy between a state officer and a private party. The court in *Cobb*, concluded that "something more" than a state judgment standing alone is required to satisfy the presence of "state action". *Id.* at 1251.

The record here shows no state action beyond the mere ministerial act of confirmation of a private arbitration award.

Similarly, in *United States v. American Soc. of Composers, Authors & Publishers*, 708 F. Supp. 95, 96-97 (S.D.N.Y. 1989) the District Court rejected petitioner's due process violation claim due to his failure to demonstrate any state action. Petitioner's claim of state action was premised upon the court's approval of a consent decree which required the establishment of a grievance procedure.

The District Court there rejected petitioner's claim in reliance on and citing from the decision in *Mount St. Mary's Hospital v. Catherwood*, 26 N.Y. 2d 493, 500, 260 N.E. 2d 508, 511, 311 N.Y.S. 2d 863, 867 (1970):

> The simple and ineradicable fact is that voluntary arbitration and compulsory arbitration are fundamentally different if only because one may, under our system, consent to almost any restriction upon or deprivation of right, but similar restrictions or deprivations if compelled by government, must accord with procedural and substantive due process.

708 F. Supp. 95, at 96-97.

The court thereupon rejected petitioner's reasoning as follows:

> Indeed, under Karmen's strained interpretation of *Mount St. Mary's*, all arbitrations could be subject to due process limitations through the simple act of appealing the arbitrator's decisions to the court system. Such a situation would negate the purpose of Article 75 which has long had an important function.

Id. at 97.

Since the underlying voluntary arbitration action was private, the mere confirmation by the state court did not give rise to any state action, especially in light of the petitioner's failure to allege any independent wrong committed by the state court or "something more" than the mere ministerial act of confirmation. To hold otherwise would in the words of the District Court, "negate the purpose of Article 75" and render every private arbitration decision subject to collateral attack by virtue of mere confirmation by a state court.

Finally, the underlying claim raised by petitioner does not offend some principle of justice so rooted in the traditions and conscience of our people so as to be ranked as fundamental and to warrant interference with the power of the state to regulate procedures under which its laws are carried out. *Patterson v. New York*, 432 U.S. 197, 201-202 (1977).

Were this Court to find state action in the mere ministerial act of a state court's confirmation of an arbitration award, then the floodgates of litigation would open to every disgruntled party to an arbitration. This would defeat the long stated federal and New York State policy of favoring arbitration as a method of dispute determination.

II.

A disclosed business relationship is not a constitutionally recognized ground for vacatur.

Both the lower Court and the Appellate Division found that the alleged business relationship between Mirzoeff and Kaufman, if true, was obviously disclosed to Mirzoeff. The cases dealing with "undisclosed" business relationships cited by petitioner are

simply not relevant to the facts of this case.

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), relied on heavily by petitioner, involved an *undisclosed* business relationship between the *only* neutral arbitrator and the prevailing party in an arbitration conducted under the United States Arbitration Act. There, the Court limited its ruling requiring vacatur of an award based on nondisclosure to arbitrations arising under the federal statute.

While the Court in *Commonwealth*, citing *Tumey v. Ohio*, 273 U.S. 510 (1927) declared that the rule presuming bias based on undisclosed facts of a pecuniary interest was a constitutional one in the case of courts, it did not extend this rule to arbitration cases arising under state law. Justice White in his concurring opinion (joined by Justice Marshall) explained that the decision does not hold arbitrators to standards of "judicial decorum." Parenthetically, Justice White also recognized that an award would not be vacated if a party failed to object to a disclosed relationship.

The other state cases cited by petitioner also involve "undisclosed" business relations. Clearly, none of these cases are applicable here where the relationship was a disclosed one and petitioner failed to object. Petitioner has failed to cite even one case where a disclosed relationship was the basis for vacatur of an award.

In *Aetna Life Insurance v. Lavoie*, 475 U.S. 813, 827-828 (1986) the Court declined to extend the rule requiring reversal of a judgment to a situation where the disqualified judge's vote was mere surplusage.[3]

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3. The Court in *Aetna Life Insurance v. Lavoie*, 475 U.S. 813, 825-826 at fn. 3, specifically criticized the *Commonwealth Coatings Corp.* decision in (Cont'd)

In *Commonwealth, supra,* the failure of the *sole* neutral arbitrator to disclose the prior business relationship resulted in his disqualification. In *Aetna*, the disqualified judge's vote was decisive in a five to four decision. *Tumey, supra,* involved a single judge.

In our case, however, even if Kaufman was disqualified, his vote was mere surplusage under the five to none unanimous decision. New York courts have consistently upheld arbitration decisions where the vote of the "disqualified" or "biased" arbitrator was mere surplusage. *Lastmor Products Manufacturing Corp. v. Storozom,* 279 App. Div. 748, 108 N.Y.S. 2d 317 (2nd Dep't 1951), *aff'd.*, 304 N.Y. 597 (1952); *St. George Textile Corp. v. Brookside Mills Inc., N.O.R.*, 85 N.Y.S. 2d 621 (Sup. Ct. N.Y. Co. 1948).

III.

Petitioner waived his objections to the arbitrators.

As an additional ground in support of confirmation, both the lower court and the Appellate Division found that under New York law, petitioner had waived objections to the arbitrators based on facts clearly disclosed to him (6-7a, 11-12a). *See, e.g., Matter of Siegel (Lewis),* 40 N.Y. 2d 687, 690, 389 N.Y.S. 2d 800, 802, 358 N.E. 2d 484, 486 (1976); *J.P. Stevens and Co. v. Rytex Corp.*, 34 N.Y. 2d 123, 129, 356 N.Y.S. 2d 278, 282, 312 N.E. 2d 466, 469 (1974); *Cross Properties v. Gimbal Bros. Inc.*, 15 A.D. 2d 913, 225 N.Y.S. 2d 1014, 1016 (First Dep't 1962), *aff'd.*, 12 N.Y. 2d 806, 236 N.Y.S. 2d 61, 187 N.E. 2d 129 (1962); *Sterling Cheek*

(Cont'd)
reading *Tumey v. Ohio* as constitutionalizing any rule that a decision rendered by a judge with the "slightest pecuniary interest" constitutes a violation of the Due Process Clause.

v. Chubb & Son Inc., 70 A.D. 2d 622, 416 N.Y.S. 2d 313, 314 (2nd Dep't 1979); *East India Trading Co. v. Carmel Exporters and Importers Ltd.*, 97 N.Y.S. 2d 556, 559-560 (Sup. Ct. N.Y. Co. 1950), *aff'd.*, 278 App. Div. 757, 103 N.Y.S. 2d 1021 (First Dep't 1951).

The finding of petitioner's waiver was further buttressed by petitioner's continuation of the arbitration without written objection as required by Section 13 of the DDC arbitration by-laws (7ra). In fact, although petitioner's counsel did file written objection concerning evidentiary rulings (8ra), no objection was filed with respect to the arbitrator's alleged impartiality.

Contrary to petitioner's present contentions, his silence in failing to object to the arbitrator was deliberate and knowing behavior unlike the facts in *Johnson v. Zerbst*, 304 U.S. 458 (1938) where a defendant's waiver of his right to counsel in a criminal matter was in issue. Here, petitioner was represented by an attorney who was a former general counsel to the DDC (24a).

Furthermore, the waiver was not of a "constitutional principle" but of the evidentiary right to object to an arbitrator selected by the party in the context of this fact situation where petitioner with full knowledge of the facts chose not to object.

Finally, the equitable doctrine of unclean hands should be applied to bar the petitioner from coming forward after an adverse decision when he kept *his* conduct secret from his adversary in the hopes of possibly influencing the arbitrator to render a decision in his favor.

IV.

The state court's factfinding is not reviewable under the circumstances of this case.

The Supreme Court has stated that it will normally not disturb a state court's finding of fact. ". . .[I]t is normally within the power of the State to regulate procedures under which its laws are carried out including the burden of producing evidence and the burden of persuasion." *Patterson v. New York, supra,* 432 U.S. at 201.

Even in a case where constitutional principles are present, unlike here, the findings of a state court concludes the Supreme Court except where the finding is wholly lacking support in evidence. *Columbe v. Connecticut,* 367 U.S. 568, 603 (1961).

The factual finding by the Appellate Division that petitioner did not sufficiently demonstrate his allegation of arbitrator's misconduct (6a) is a predicate finding of fact in a procedural context unlike the substantive, constitutional factfinding in the First Amendment cases cited by petitioner (Pet. for Cert. at 8).

Since arbitration proceedings are favored by New York law as a desirable alternative to litigation, its courts have fostered a clear judicial policy in favor of non-interference with this form of dispute resolution. *Matter of Sprinzen (Nomberg),* 46 N.Y. 2d 623, 629, 415 N.Y.S. 2d 974, 976, 389 N.E. 2d 456, 458 (1975). In furtherance of the foregoing policy, New York law places the burden of proof on a party alleging the arbitrator's bias or misconduct which must be shown "clearly and convincingly." *Ottley v. Mostoff,* 79 A.D. 2d 964, 435 N.Y.S. 2d 279, 280 (First Dep't 1981), *aff'd.,* 54 N.Y. 2d 698, 442 N.Y.S. 2d 989, 426 N.E. 2d 483 (1981); *Matter of S. Weiner Furniture Co. Inc.,* 90 A.D. 2d 875, 456 N.Y.S. 2d 474, 475-476 (Third Dep't 1982); *Goltz*

v. Ripps, 88 A.D.2d 1052, 452 N.Y.S. 2d 681, 682 (Third Dep't 1982).

It is within the trial court's discretion on an Article 75 application to grant confirmation based on the affidavits presented or to grant a hearing, where required. *North American Foreign Trading Corp. v. Rosen*, 73 A.D. 2d 883, 424 N.Y.S. 2d 8 (First Dep't 1980).

While the court must make a threshold determination as to the allegations, *Thermasol Ltd. v. Drieske*, 78 A.D. 2d 838, 433 N.Y.S. 2d 166, 167 (First Dep't 1980), *aff'd.*, 52 N.Y. 2d 1069, 438 N.Y.S.2d 520, 420 N.E. 2d 401 (1981), a hearing is not required based on allegations of a mere suggestion of partiality which does not satisfy the "clear and convincing" standard. *Brill v. Muller Brothers Inc.*, 22 A.D. 2d 678, 253 N.Y.S. 2d 391 (First Dep't 1964); *Perl v. General Fire & Casualty Co.* 34 A.D. 2d 748, 310 N.Y.S. 2d 196, 198 (First Dep't 1970).

Since under New York law, petitioner did not meet his procedural burden of alleging misconduct by the "clear and convincing" standard, no evidentiary hearing was required.[4]

Petitioner's reference to Rule 56(c) of the Federal Rules of Civil Procedure is not "analogous", since a disgruntled party to an arbitration who accuses an arbitrator of misconduct must satisfy a higher burden. The "clear and convincing" standard is certainly a rational one, or else every dissatisfied party to an arbitration can defeat the purpose of arbitration by a conclusory, sour grapes allegation that the arbitrator was biased or committed misconduct

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4. We submit that petitioner would have failed to satisfy his burden even under a Federal Rule 56 motion since a party opposing a motion for summary judgment is not entitled to hold back evidence until the time of trial. *Lipschutz v. Gordon Jewelry Corp.*, 373 F. Supp. 375, 384 (S.D. Texas, 1974).

in one form or another.

Petitioner's allegation concerning Kaufman's alleged misconduct was totally devoid of detail. The "low" offer for the ring was not furnished. The date, time, other circumstances and whether or not any witnesses were present was not furnished. By contrast, Kaufman submitted a detailed factual affidavit in addition to the affidavit submitted by respondent and respondent's counsel. Although petitioner was afforded an opportunity to reply to Kaufman's affidavit, he failed to do so. Under these circumstances, the lower court and the Appellate Division properly found that petitioner failed to meet the "clear and convincing" standard.

V.

The petition is frivolous.

We respectfully submit that the instant petition for a writ of certiorari is frivolous for several reasons. The petitioner has failed to demonstrate that a justiciable federal question is present, due to the fact that the Fourteenth Amendment due process claim was not raised in the state courts and also due to the absence of state action. *See, e g., Martin-Trigona v. Champion Federal Savings & Loan Assoc.*, 892 F.2d 575, 577 (7th Cir., 1989).

Additionally, petitioner has attempted to misrepresent the state court's clear finding of facts with respect to petitioner's failure to demonstrate the arbitrator's misconduct, the finding that the alleged bias was "disclosed" to petitioner, and by incorrectly referring to Kaufman as a "tainted" arbitrator when no bias was found by the court.

When petitioner and respondent agreed to the arbitration, they entered into a prospectively economical, favored alternative

means of civil dispute resolution. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Matter of Sprinzen, supra.*

Instead of an economical dispute resolution, respondent Namdar was given a lesson in the economics of civil litigation.

Petitioner not only vigorously contested confirmation of the award, but appealed the case through the New York court system. Petitioner, undeterred by a unanimous affirmance of the Appellate Division, moved to the Appellate Division for leave to appeal to the Court of Appeals. Upon denial of the motion without dissent, petitioner moved directly to the Court of Appeals for leave to appeal. The motion was again denied without dissent. Still unremorseful, petitioner moved for rehearing and moved to amend the remittitur to provide that a constitutional issue had been necessarily raised and considered. That motion was also denied without dissent, and petitioner filed the instant petition.

In view of the foregoing, we submit that this is an appropriate case for this Court to award respondent damages in the sum of Ten Thousand ($10,000) Dollars pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States together with an award of double costs.

CONCLUSION

The petition for a writ of certiorari should be denied and an award of damages should be granted to respondent for petitioner's filing of a frivolous petition.

Dated: New York, New York
May 31, 1991

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM AFFIRMATION OF HYMAN BRAVIN, ESQ. IN SUPPORT OF PETITIONER'S MOTION FOR LEAVE TO APPEAL DATED JULY 6, 1990

The respondent-appellant now seeks permission of this Court to appeal to the Court of Appeals on two certified questions:

1. Whether an arbitrator participating in an arbitration process can simultaneously engage in negotiations to purchase a diamond ring from a party and not disclose his self-dealing transaction to the other party and the other members of the panel?

2. Did the arbitrator who negotiated with Mirzoeff, a party, to purchase his 10-carat diamond ring and failed to disclose said negotiations to the other party and the other members of the arbitration panel commit misconduct in violation of CPLR 7511 (subd. (b) 1. cl. (i)?

APPENDIX B — EXCERPTS OF PETITIONER'S MOTION FOR LEAVE TO APPEAL DATED NOVEMBER 13, 1990

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the

ARBITRATION OF CERTAIN CONTROVERSIES BETWEEN MOTI NAMDAR,

Petitioner-Respondent,

-against-

ELI MIRZOEFF,

Respondent-Appellant.

APPLICATION FOR LEAVE TO APPEAL

Questions Presented

This application by Respondent-Appellant, Eli Mirzoeff (hereinafter "Mirzoeff"), which warrants review by the Court, presents novel and complex questions of overriding importance to members of international and national trade associations located in New York who settle their business disputes with other members through compulsory arbitration. Both parties herein are members of the Diamond Dealers Club ("D.D.C."), the leading diamond bourse in the world, which has its own arbitration panels, made up of elected members:

1. Whether an arbitrator participating in arbitration hearings can simultaneously engage in negotiations to

purchase a diamond ring from Mirzoeff, a party and not disclose his self-dealing transaction to the other party and the other members of the arbitration panel?

2. Did the arbitrator who negotiated with Mirzoeff, a party, to purchase his 10-carat diamond ring and failed to disclose said negotiations to the other party and the other members of the arbitration panel commit misconduct in violation of CPLR 7511.

APPENDIX C — EXCERPTS OF AFFIDAVIT OF ABE KAUFMAN SWORN TO ON APRIL 29, 1988

12. The proceedings were conducted with civility and in accordance with the due process rights of all concerned parties. Both sides, represented by counsel, presented their documents and witnesses and their respective attorneys conducted extensive cross-examination.

13. During the course of the proceedings, there was not at any time any objection by the parties or counsel to the members of the panel and there were no charges of bias or prejudice. Further, no objections were made by Mr. Mirzoeff or his attorney at the proceeding of the matters which he now raises in his papers. This is the first time I have heard of such objections.

14. At the conclusion of the arbitration, the arbitrators examined and reviewed all of the facts as sophisticated merchants in accordance with their understanding of American Civil Law and trade customs and practices. There was no bias or prejudice in any of the deliberations or conduct of the proceedings. There was no discussion of Jewish Law in the conduct of the proceedings or in the deliberations.

* * *

23. The matter of the diamond ring played no part in my deliberations with the other members of the Panel. In fact, on February 9, 1988 when we concluded the hearing and commenced deliberations, it was a dead issue in my mind. Mr. Mirzoeff had not gotten back to me concerning anything relating to the ring. Since I had no great interest in purchasing this ring, and since there was nothing further pending, I wasn't even consciously aware of this matter. The unanimous award by the arbitrators was based solely on the facts presented and our understanding of the

applicable law. There was absolutely no bias or prejudice in the conduct of the proceeding, the deliberations thereon and the rendering of the award.

APPENDIX D — EXCERPTS FROM AFFIRMATION OF BENJAMIN P. EISENBERGER, ESQ. DATED APRIL 20, 1988

4. Mr. Mirzoeff raised the defense that the sapphire had been returned to Mr. Namdar's brother-in-law in the elevator of the building wherein Mr. Namdar's offices are located. Mr. Namdar's brother-in-law denied these charges. It was undisputed that Mr. Namdar retained possession of the original memorandum signed by Mr. Mirzoeff's authorized agent. Section 4 of Article *XIX* of the Diamond Dealers Club Inc. by-laws, relating to custom and usage trade rules, is the controlling section. Section 4 states as follows:

> "Memorandums. No goods shall be given or received without a signed memorandum, and *any return of goods must be acknowledged in writing or by the return of the signed memorandum.*" (emphasis added)

APPENDIX E — EXCERPTS OF EXHIBIT ATTACHED TO AFFIDAVIT OF ABE KAUFMAN SWORN TO ON APRIL 29, 1988

Sec.13b. Hearing: The parties are entitled to be heard, to present evidence, to cross-examine witnesses and have the right to be represented by an attorney. Nowithstanding the failure of a party duly notified to appear, the arbitrators may hear and determine the controversy upon the evidence produced.

Sec.13c. Waiver: Except the right to representation by an attorney a requirement of section 13b may be waived by written consent of the parties and it is waived if the parties continue with the arbitration without written objection.

APPENDIX F — EXCERPTS OF AFFIRMATION OF HYMAN BRAVIN, ESQ. DATED MAY 19, 1988

5. As another point, I call the attention of the Court to the fact that the last session of the Appeal Committee took place on February 9, 1988. During the last session, in my professional opinion, a prejudicial and inaccurate statement was made by the attorney for NISSIM/NAMDAR. I wrote a protesting letter to KAUFMAN; hand-delivered it with enough copies for each member of the Appeal Committee Panel; and also hand-delivered a copy to said attorney for the complainants. I append* as Exhibit "4" a copy of my February 10, 1988 letter along with the reply of the attorney for NISSIM/NAMDAR, dated February 11, 1988. It is submitted that KAUFMAN received both letters *before* a decision was rendered on February *12* (*not* February "10" as stated in KAUFMAN's affidavit of April 29, 1988).

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* Omitted herein.

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No. 90-1705

IN THE

Supreme Court of the United States

October Term, 1990

ELI MIRZOEFF,

Petitioner,

against

MOTI NAMDAR,

Respondent.

ON PETITION FOR CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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No. 90-1705

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990.

ELI MIRZOEFF,

Petitioner,

against

MOTI NAMDAR,

Respondent.

ON PETITION FOR CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

Reply to Brief in Opposition to Certiorari

Close scrutiny of the respondent's brief only serves to prove the substantiality of petitioner's case, while putting to rest any claims of procedural infirmities.

I.

Petitioner seeks review of state action taken in violation of due process of law

Whether, and to what extent, arbitration between private litigants partakes of state action has never been decided by this Court. Although a district court answered in the negative in *Austern v. Chicago Board Options Exchange, Inc.* 716 F. Supp. 121, 125 (S.D.N.Y. 1989), aff'd on other grds; 898 F. 2d 882 (2d Cir.), cert. den., ____ U.S ____, 112 L Ed 2d 107 (1990) the Court of Appeals affirmed on other grounds, 898 F. 2d 882 (2d Cir.) and this Court denied certiorari, ____ U.S. ____, 112 L. Ed. 2d 107 (1990), see pet.*, p. 11, f.n. Reliance by respondent on this and other cases to show that the issue is settled, br., p. 6, is patently inappropriate.

F.D.I.C. v. Air Florida System, Inc., 822 F. 2d 833, 842, f.n. 9 (9th Cir. 1987), cert. den. 485 U.S. 987 (1988) involved a ruling by a lower federal court interpreting the definition of an arbitrator's misconduct contained in 9 USC §10(c) as well as Fifth Amendment due process. Moreover, the case at bar raises a question going to the very integrity of the decision-making process. The *Air Florida* case merely involved whether the arbitrators could proceed on written submissions or whether they were bound to conduct a hearing at which oral testimony and argument could be offered.

Elmore v. Chicago Illinois Midland Ry Co., 782 F. 2d 94 (7th Cir. 1986) was decided on the basis that the grievance procedure complained of was not arbitration, *id.* at 96-97. Indeed, the distinguished circuit judge who authored the opinion noted that the National Railroad Adjustment Board

*Page references to the petition and its appendix are indicated by "Pet., p. ____" and "pet., p. ____ a," respectively. Arabic numbers preceded by "br." refer to respondent's brief in opposition to certiorari.

had sufficient governmental connection to be subject to the requirements of Fifth Amendment due process, *id.* at 96.

Respondent's assertion, br., p. 6, that the filing of a lawsuit and the obtaining of relief by a private party does not constitute state action, *Cobb v. Georgia Power Co.*, 757 F. 2d 1251-53 (11th Cir. 1985) begs the question. Agreements to arbitrate are enforced and arbitrators' awards are reduced to judgment or vacated only because Congress or a state legislature has authorized the courts to take such action, 9 U.S.C. §§2-4, 10; NYCPLR 7501-7504, 7511. To suggest, as respondent does, br., p. 7, that such acts are "ministerial" reduces the judiciary to the status of low-grade clerks. Regardless of the latitude given to private parties to govern the arbitration process, government may not lend its power to enforce private arrangements that offend the Constitution, *Shelley v. Kramer*, 334 U.S. 1, 13 (1948).

It strains respondent's credibility for him to suggest, br., p. 8, that judicial toleration of a biased arbitrator does not offend a fundamental principle of our jurisprudence.

Although the arbitration giving rise to this case was conducted by a non-governmental body, contrary to respondent's assertion (br., pp. 1, 7-8), such arbitration was far from "voluntary." Failure of a member of the Diamond Dealer's Club to submit to the Club's arbitration tribunals is grounds for expulsion: tantamount to exclusion from the diamond-trading industry.

II.

The negotiations between the chairman and petitioner were not disclosed to the other arbitrators

Respondent's assertion, br., pp. 7-8, that the ground for disqualification of the chairman of the appeal panel (the

fact of their negotiations during the arbitration process) was "disclosed" and therefore not a basis for vacatur is misleading.

Respondent ignores the fact that the chairman's attempt to coerce the petitioner into parting with merchandise at an unfavorable price by linking the transaction to the outcome of the then pending arbitration *was never made known to the other arbitrators.* See br., pp. 8-9. As we set forth in the petition, p. 11, the harm from this undisclosed transaction results from the mistaken belief by the other arbitrators that they were deliberating with an impartial colleague instead of someone who had an interest in the outcome of the arbitration.

The disqualification of the entire panel because of the misconduct of one of the members was decreed by this Court as a matter of statutory interpretation in *Commonwealth Coatings Corporation v. Continental Casualty Co.,* 395 U.S. 145 (1968). Whether this same rule must be followed as a matter of constitutional due process remains an open question along with the analogous question of whether this rule should also be applied to collegial courts, *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 827-828 (1986), and see pet., p. 11, f.n. **

Respondent cites state cases to the effect that the disqualification of the chairman would have no effect upon the outcome as a matter of state law, br. p. 10. This ignores the primacy of the Constitution of the United States and this Court as its final interpreter. Moreover, *Lastmor Products Manufacturing Corp. v. Storozom,* 279 App. Div. 748, 108 N.Y.S. 2d 317 (2d Dept. 1951), aff'd 304 N.Y. 597, 107 N.E. 2d 87, does not hold that multi-member arbitration panels can render a valid award without the tainted member, but is a "waiver" case. *St. George Textile Corp. v. Brookside Mills Inc.,* N.O.R. 85 N.Y.S. 2d 621 (S. Ct. N. Y. Co. 1948) did permit the untainted arbitrators to render an

award but is a lower-court decision that cannot be considered an authoritative exposition of state law.

III.

Petitioner never waived his right to due process

Apart from the lack of any federal authority to support the assertion that petitioner waived his due process claim, br., p. 10, respondent also misstates some critical facts. Petitioner's counsel could not have made any written objection to the chairman's continued participation since he, himself, did not learn of the negotiations between the chairman and petitioner until after the award had been rendered, pet., p. 24a. Why petitioner did not disclose these negotiations during the pendency of the arbitration—even to this counsel—has been set forth at pp. 11-12 of the petition. Nowhere does respondent dispute petitioner's major premise that petitioner was under duress since it would have been commercially hazardous for him to have "blown the whistle" on the chairman.

The unsupported suggestion by respondent that an arbitrator's bias is an "evidentiary" matter, br., p. 11, and not something going to the very integrity of the decision-making process, is ludicrous. It is because the issue raised herein goes to the fundamental fairness of the arbitration process that cases such as *Johnson v. Zerbst,* 304 U.S. 458 (1938) are pertinent to the case at bar.

IV.

The question presented in the petition was properly preserved and presented for review in this court

Contrary to respondent's assertion, br., p. 5, the question of denial of due process presented herein was raised at the

very outset of the state court proceedings, as reflected in the trial judge's decision (pet., pp. 10-11a). Respondent acknowledges that the issue was discussed in petitioner's brief to the Appellate Division. Pursuant to the rules of the New York Court of Appeals, a copy of that brief was included among the papers submitted on petitioner's motion for leave to appeal, 22 N.Y. Codes, Rules & Regs. §500.11(d). This question was necessarily before the Court of Appeals on the motion for leave to appeal and even respondent concedes that the question was briefed extensively on the motion for rehearing, br., p. 5.

Respondent improperly attempts to tax petitioner with omitting portions of the record, br., p. 4. Although both petitioner and respondent have necessarily made reference to the facts underlying this case, the issue before this Court is not whether the arbitrators correctly determined the merits but whether the state courts enforced an award that, for purposes of these proceedings, must be assumed to have been tainted by the chairman's bias.

The respondent at br., p. 4, seeks to take advantage of a typographical error at pet., p. 6a,* which reads

> ***Mirzoeff has not sufficiently demonstrated his allegations of the *arbitrator's* misconduct. (emphasis added)

As the respondent is aware, that passage from the opinion of the Appellate Division as officially reported at 161 AD 2d 348, 349, reads

> ***Mirzoeff has not sufficiently demonstrated his allegations of the *arbitrators'* misconduct. (emphasis added)

*Page 6a, as corrected, and Page 7a (the opinion of the Appellate Division) are appended hereto.

Accordingly, respondent's contention as to a "key finding of fact" by the Appellate Division is erroneous. The Appellate Division was merely making a general reference to other state law issues in the case. In the following paragraph, the Appellate Division turned to the issue sought to be reviewed herein, holding petitioner to have waived the issue of the chairman's bias by continuing to participate in the arbitration. This is precisely the ground upon which the trial court ruled, pet., p. 11a. As petitioner demonstrated, pet., p. 12, this issue was never "waived."

Respondent's reliance, br., p. 12, upon *Columbe v. Connecticut,* 367 U.S. 568, 603 (1961) as authority for deference to state court findings of fact is ironic. The portion of the opinion cited by respondent speaks of the advantage of the trial court in being able to judge the credibility of the witnesses before it. In the case at bar, despite the stark conflict between petitioner and the chairman as to what occurred between them, pet., pp. 19-23a, the trial court failed to hold an evidentiary hearing into the arbitrator's alleged misconduct; to hear the witnesses so that their credibility might be judged. Such a failure would be remediable upon remand from this Court. Respondent makes no attempt to distinguish this case from those cited at p. 8 of the petition, such as *N. Y. Times v. Sullivan,* 376,.U.S. 254, 285-86 (1964), where this Court has scrutinized the record to determine if governing federal law has been properly applied to questions of constitutional right; and, in this case, whether a hearing was unconstitutionally denied by the state court.

V.

There is no basis for respondent's invocation of Rule 42.2

Whatever the disposition of this case, the arguments set forth in the petition and in this brief demonstrate that petitioner has presented reasonable, good-faith arguments for extension, modification or clarification of existing law. For this reason, there is no foundation for respondent's request for damages or costs under Rule 42.2 of the Rules of this Court, *Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1071, f.n. 11 (1981) (Stevens, J., concurring).

Moreover, any delay in the payment of the judgment sought to be reviewed herein has not harmed respondent. He was protected by the appeal bond that remained in force from the taking of the initial appeal to the Appellate Division, through all appellate proceedings, including an application to the Appellate Division for a stay pursuant to Rule 23.3, when an interim stay was in effect, until Justice Marshall denied petitioner's application for a stay on June 7, 1991, whereupon the judgment was satisfied.

Dated: New York, New York
June 19, 1991

Respectfully submitted,

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Opinion of the Appellate Division, May 10, 1990, Affirming Confirmation of Arbitrator's Award

In the Matter of the Arbitration between Moti Namdar, Respondent, and Eli Mirzoeff, Appellant.—Order and Judgment (one paper), Supreme Court, New York County (Karla Moskowitz, J.), entered January 20, 1989, which confirmed an arbitration award rendered on February 12, 1988 by a unanimous five-member appeal committee of the Diamond Dealers Club, Inc. in favor of petitioner for the sum of $64,767.91, is unanimously affirmed, with costs.

The underlying facts of this case concern the sale of a sapphire sold by Moti Namdar and Shmuel Nissim to Eli Mirzoeff. The arbitrators subsequently determined that Mirzoeff owed Namdar the negotiated price of the sapphire. Namdar moved to confirm the award. Mirzoeff opposed the motion alleging that the arbitrators were prejudiced against him, the award was irrational and the arbitration proceeding was marred by procedural irregularities. The IAS court granted the petition to confirm the award and rejected Mirzoeff's contentions.

Courts have fostered a clear judicial policy in favor of non-interference in arbitration proceedings. (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623.) In a consensual arbitration such as this one, arbitrators are not bound either by principles of substantive law or the rules of evidence. (*Matter of Silverman [Benmore Coats]*, 61 NY2d 299, 308.) Rather, the burden of proof is on the party alleging the misconduct and such misconduct must be proven "clear[ly] and convincing[ly]". (*Matter of Weiner Furniture Co. [Kingston City Schools Consol.]*, 90 AD2d 875.) Upon our review of this record, we conclude that Mirzoeff has not sufficiently demonstrated his allegations of the arbitrators' misconduct.

A party who proceeds with an arbitration with actual knowledge of bias on the part of an arbitrator or facts that

should have prompted further inquiry, waives his objection to the arbitration. (*Matter of Stevens & Co. Inc. [Rytex Corp.]*, 34 NY2d 123, 129.) In this case, the alleged prejudice of the arbitrators was known to Mirzoeff before completion of the arbitration proceeding. Mirzoeff, however, did not raise the alleged bias until well after the arbitration award was rendered. Accordingly, the claims relating to the arbitrators' alleged prejudice have been waived. (*See, Matter of Siegel [Lewis]*, 40 NY2d 687, 690.)

We have considered Mirzoeff's other claims and find them to be meritless. Concur—Kupferman, J. P., Sullivan, Ross, Carro and Kassal, JJ.